

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA	:	
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	:	DECISION OF THE
vs.	:	
	:	COMMANDANT
LICENSE NO. 700054 and MERCHANT	:	
MARINER'S DOCUMENT 532 86 7720	:	ON APPEAL
	:	
Issued to: Sean K. O'Connell, Appellant	:	NO. 2579
	:	

This appeal is taken in accordance with 46 U.S.C. 7702 and 46 C.F.R. 5.701.

By order dated October 7, 1994, an Administrative Law Judge of the United States Coast Guard at Seattle, Washington, revoked Appellant's license and document based upon finding proved the charge of *use of a dangerous drug*. The single specification supporting the charge alleged that on or about August 23, 1993, Appellant wrongfully used cocaine as evidenced by a drug test and the urine specimen collected on that date.

A hearing was held at Seattle, Washington, on October 21, 1993. Appellant elected to represent himself and entered a response admitting the charge and specification.

During the hearing, the Coast Guard Investigating Officer introduced three exhibits into evidence. Appellant offered eight exhibits into evidence and testified on his own behalf. The Administrative Law Judge added 12 additional exhibits to the record.

At the end of the hearing, the Administrative Law Judge issued a written Memorandum and Order (M&O) concluding that the charge and the single specification were found proved by plea. The Administrative Law Judge further determined that Appellant, although not cured at the time of the hearing, had presented credible evidence that he was undertaking a serious effort

to rehabilitate himself. Therefore, the Administrative Law Judge continued the hearing to allow the Appellant more time to show proof of cure. However, the hearing was never

reconvened. In the final Decision and Order (D&O), dated October 7, 1994, the Administrative Law Judge found that Appellant failed to provide satisfactory proof of cure, and thus, Appellant's license and merchant mariner's document were revoked.

Appellant's petition to reopen the hearing, dated November 3, 1994, was denied by the Administrative Law Judge on November 9, 1994. Appellant filed a timely notice of appeal on November 15, 1994, and completed his appeal on December 9, 1994. Therefore, this appeal is properly before the Commandant for review.

APPEARANCE: Appellant, *pro se*.

FINDINGS OF FACT

At all relevant times, Appellant was the holder of the above captioned license and document. Appellant's license authorized service as master on ocean or near coastal steam or motor vessels of not more than 1600 gross tons, and also as radar observer. On August 23, 1993, Appellant provided a urine specimen for a random drug screening initiated by his employer. Appellant's urine specimen subsequently tested positive for cocaine metabolites.

After being charged with *use of a dangerous drug*, Appellant freely entered into a good faith deposit agreement with the Coast Guard. This agreement provided that Appellant's license and documents would remain on deposit with the Coast Guard until he could successfully prove cure to the satisfaction of the Administrative Law Judge.

At the initial hearing, the Administrative Law Judge found that Appellant's efforts to show cure were credible. Specifically, Appellant had already entered into an intensive rehabilitation program, consisting of inpatient and outpatient phases. This program began on September 27, 1993, with an estimated completion date of November 25, 1993. Following the

successful completion of this program, Appellant then intended to embark on a two year aftercare program. Based on this evidence, the Administrative Law Judge decided to continue the hearing until Appellant had the opportunity to complete the cure process. No specific date for the final hearing was provided.

In addition, the Administrative Law Judge informed Appellant at the hearing that the normal cure standard required a 12 month period of successful aftercare, following successful completion of the rehabilitation program. Based on this standard, Appellant would be eligible to show cure on November 25, 1994. However, because of the Appellant's aggressive rehabilitation efforts and the fact that Appellant had already been participating in the rehabilitation program during the months of September and October of 1993, the Administrative Law Judge decided to credit Appellant with two months' time, thus reducing the necessary aftercare period to ten months. After the Appellant acknowledged this credit, the Administrative Law Judge recommended that in August 1994, Appellant begin to collect the appropriate documentation for the final hearing. The Administrative Law Judge also informed Appellant that the final hearing could be based solely on Appellant's written submissions; an in person meeting was not necessary.

In conjunction with this initial hearing, the Administrative Law Judge issued a written Memorandum and Order. It granted Appellant a continuance until "he successfully completes his rehabilitation program" and also projected the anticipated date for completion of rehabilitation, or cure, to be September 1, 1994, based on the two month credit. However, the Memorandum and Order also reiterated the cure factors set forth in Appeal Decision 2535 (Sweeney), which include the successful demonstration of a complete non-association with drugs for a *minimum* period of one year following the initial rehabilitation program.

In conclusion, the Memorandum and Order stated that a final hearing would be convened at which time the Administrative Law Judge would make a final determination as to whether Appellant was cured. No date was given for this final hearing, nor does the record show that

Appellant was given notice of a date for the hearing. In spite of this, the Administrative Law Judge rendered his Decision and Order on October 7, 1994. This order

concluded that, 12 months after the initial hearing, the Appellant had not successfully shown proof of cure. Appellant's license and documents were thereby revoked.

After receiving the Decision and Order, Appellant petitioned the Administrative Law Judge to reopen the hearing. The basis for this petition alleged that Appellant was still fulfilling the requirements to show cure. The petition indicated that Appellant's initial rehabilitation program actually ended on December 8, 1993, instead of November 25, 1993, that Appellant was actively participating in aftercare, and that he had been subject to 14 drug screenings during the aftercare program and all were negative. The Administrative Law Judge denied this petition.

BASES OF APPEAL

Appellant asserts that he was denied due process of law because the Administrative Law Judge did not provide the Appellant with adequate notice of the continuance.

OPINION

Appellant asserts that he was denied due process because he was not given notice of the date of the final hearing, and therefore was denied the opportunity to present evidence of his rehabilitative progress. I agree.

The regulations are clear that it is within the discretion of the Administrative Law Judge to continue a hearing. 46 C.F.R. 5.511. This procedure is useful in cases such as this when a Respondent has shown a substantial involvement in the cure process and a continuance would allow the Respondent to complete the process. See Appeal Decision 2535 (SWEENEY). However, the regulations are also clear that the Administrative Law Judge should either announce the continuance date at the hearing or provide other appropriate notice. 46 C.F.R.

5.511; Appeal Decision 1900 (ORKWISZEWSKI). My review of the record in this case indicates that no such notice was given to Appellant. Furthermore, the final

hearing was never held. Instead, the Administrative Law Judge issued a final decision based on the fact that he had not received any proof of cure from the Appellant.

Although the Administrative Law Judge provides several hints in the record as to his expectations for Appellant's final submission of proof of cure, they do not satisfy the notice requirement for a final hearing after a continuance has been granted. During the initial hearing, the Administrative Law Judge stated "I would say in the month of August would be a good time as far as getting everything together. . . ." [Transcript (TR) at 41]. The Administrative Law Judge also mentioned September of 1994 as the "projected" date of cure. [TR at 41; M&O at 3]. In contrast, the Memorandum and Order intimates that the stricter Sweeney factors, which require a full year of successful aftercare, were applicable to the Appellant, making November of 1994 the earliest month in which Appellant would have been able to comply with the cure requirements. [M&O at 2, 3]. However, neither the recommendation to the Appellant to "begin in August" to compile his necessary proof of cure, nor the two possible dates for cure completion provided Appellant with an actual date for the final hearing. Instead, the inconsistency between these references adds to the confusion over the possible time frame for the final hearing.

In summary, the Appellant was incorrectly denied the opportunity to be present at a final hearing. Therefore, since the record indicates that Appellant was apparently still making a good faith effort to show cure within the Sweeney guidelines, he should have been allowed to provide the Administrative Law Judge with proof of cure.

CONCLUSION

The Administrative Law Judge committed error because he did not provide Appellant with notice of the date of the final hearing after granting a continuance, as required by 46 C.F.R. 5.511.

ORDER

The Decision and Order of the Administrative Law Judge, dated December 14, 1994, is hereby REMANDED. The Administrative Law Judge is directed to reopen the hearing and to permit the Appellant to present any evidence of cure.

/S/
R. D. HERR
Vice Admiral, U.S. Coast Guard
Acting Commandant

Signed at Washington, D.C. this 19th day of August, 1996.